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Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1192

R. E. KELLERMAN, TED WEINER and NICHOLS & COMPANY,

Petitioners,

versus

PRESTON J. MILLER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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R. E. KELLERMAN; TED WEINER and NICHOLS & COMPANY,

Petitioners,

versus

PRESTON J. MILLER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners, R. E. Kellerman, Ted Weiner and Nichols & Company, Inc. (hereafter called "Kellerman"), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered on December 16, 1965 in the above entitled case. That judgment affirmed, *per curiam*, a judgment of the United States District Court for the Western District of Louisiana, cancelling an oil and gas lease on the grounds that lessee had failed to pay the proper delay rental.

OPINIONS BELOW.

The opinion of the United States District Court for the Western District of Louisiana (Hunter, J.) (R. 179), is reported at 228 F. Supp. 446 (1964). The opin-

ion of the Court of Appeals *(per curiam)* is reported at 354 F.2d 46 (1965) and appears in the Appendix hereto at page 36. The judgment of the Court of Appeals appears in the Appendix hereto at page 39, and the order of the Court of Appeals denying petitioners' petition for rehearing and rehearing *en banc* is reported at 354 F.2d 46 (1966), and appears in the Appendix at page 41.

JURISDICTION.

The opinion and judgment of the Court of Appeals for the Fifth Circuit were filed on December 16, 1965. Petitioners' timely petition for a rehearing and rehearing *en banc* was denied by that Court on January 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. Whether an order of the Conservation Commission of Louisiana superseded the provisions of an oil and gas lease with the result that the inclusion of a portion of the lease in a unit around a shut-in gas well held the entire lease during the primary term without the payment of any delay rental.

2. Whether the lease contained a Pugh clause which divided the lease into two leases with the result that delay rentals were due on the portion of the lease outside the Conservation Unit.

3. Whether, if the lease contained a Pugh clause, the amount of delay rental was so uncertain as to require the application of the doctrine of *Jones v. Southern Natural Gas Company*, 36 So.2d 34 (La. S.Ct. 1948), which held that where the lessee made a reasonable mistake in the payment of delay rental, he should be given an opportunity, after notice of the error, to correct the mistake.

4. Whether Miller, by remaining silent for almost five years after accepting the rental payment and failing to question the correctness of the rental payment until almost three years after every acre of the lease had been participating in the production, had waived his right to have the lease cancelled for non-payment of delay rental.

STATUTE INVOLVED.

The statute involved is the Louisiana Conservation Statute (LSA-R.S. 30:9, subd. B) which is printed in the Appendix hereto at page 35.

STATEMENT OF FACTS.

This is a dispute between private parties. The facts are not in dispute and were stipulated by the parties in the District Court. Respondent, Preston J. Miller, granted an oil and gas lease to petitioner, R. E. Kellerman, who assigned interests in the lease to petitioners Ted Weiner and Nichols & Company, Inc. Petitioners will hereafter be referred to as

"Kellerman." The Miller Lease provides for a primary term of three years commencing May 5, 1956. It contains the customary "unless clause" providing for its termination at the end of the first year unless the lessee commenced the "drilling (spudding in) of a well on the land, or on acreage pooled therewith" or paid a delay rental of $3,900 which payment would keep the lease in effect until May 5, 1958. This paragraph further provides that the lessee can maintain the lease for another year or until May 5, 1959, without drilling, by paying a delay rental.

On March 4, 1957, the Ohio Oil Company commenced drilling the Durke well approximately 2,440 feet north of the Miller Lease. Conservation Order 367, effective March 13, 1957, established a drilling unit around the Durke well, which unit included the north half of the Miller Lease. This is a most important fact because the failure of the Court of Appeals to give the same effect to the Conservation Order that would have been given to the order by the Louisiana Supreme Court resulted in the judgment which deprived Kellerman of property of great value. The same order established a drilling unit including the south half of the Miller Lease. The Durke well was completed as a gas well on April 12, 1957 and was shut in until May 25, 1958. On April 20, 1957, Kellerman paid Miller $3,900 as the annual delay rental for the period May 5, 1957 to May 5, 1958 and on April 23, 1958, Kellerman paid Miller $3,900 as the delay rental for the period May 5, 1958 to May 5, 1959, which payment was accepted by Miller and retained until March 28, 1963. (R. 43.)

On July 19, 1958, The Superior Oil Company commenced drilling the Bernard well approximately 390 feet west of the Miller Lease on a unit including the south half of the Miller Lease. The Bernard well was completed on September 4, 1958 and was placed on production during November, 1958. Thus, as of November, 1958, all of the land covered by the Miller Lease was included in conservation units around producing gas wells and was participating in production from the Durke well and the Bernard well. (R. 45-46, 169-173.)

After participating in the production from the Durke well and from the Bernard well for more than 3-1/2 years and while every acre of the Miller Lease was still productive (R. 169-173), Miller addressed a letter to Kellerman on November 16, 1961, demanding that the Miller Lease be released. (R. 49.) When Kellerman refused to comply with Miller's demand, Miller filed suit for cancellation of the lease for breach of drilling obligations on December 28, 1961 in the Fifteenth Judicial District Court in and for the Parish of Vermilion, Louisiana, which suit was removed to the United States District Court for the Western District of Louisiana on January 18, 1962. (R. 49-50.)

Over 14 months after the suit was filed, Miller, on March 19, 1963, filed an amended complaint alleging as an additional ground for the cancellation of the lease:

> "That plaintiff was paid only $3,900 by April 23, 1958, check drawn on the Bank of Commerce of Fort Worth, Texas, by 'Ted Weiner operator'

and that the balance of the $7,800.00 delay rental due on or before May 5, 1958, under the terms of the lease was not tendered to plaintiff." (R. 29.)

By letter dated March 28, 1963, Miller, through his attorney, transmitted his check to Kellerman in the amount of $3,900, as a refund of the delay rental payment made on April 23, 1958, for the period May 5, 1958 to May 5, 1959. Miller claimed in the letter of transmittal that the rental due as of May 5, 1958 was $7,800 instead of $3,900. (R. 175-176.) By letter dated April 3, 1963, Texas Crude Oil Company, acting on behalf of Kellerman, returned Miller's check in the amount of $3,900 and, in addition, delivered to Miller its check for $3,900 as an additional rental payment for the period May 5, 1958 to May 5, 1959, making a total of $7,800, with the explanation that Kellerman did not believe any additional rental was due and with reservation of the right to have a judicial determination as to the proper amount of delay rental due for the period May 5, 1958 to May 5, 1959. (R. 43; 177-178.)

The District Court rendered judgment on March 19, 1964, decreeing that the Miller Lease had terminated on May 5, 1958 because of non-payment of the proper amount of rental on or prior to that date. (R. 203, 219.)

Kellerman filed a motion for a new trial, which the District Court denied. Kellerman appealed to the Fifth Circuit Court of Appeals which, in a *per curiam*, affirmed the judgment of the District Court. Kellerman applied for a rehearing and a rehearing *en banc*

which the Fifth Circuit Court of Appeals denied on January 25, 1966, without reasons.

REASONS FOR GRANTING THE WRIT.

The basic issue presented by this case is whether or not the inclusion of the north half of the Miller Lease in a conservation unit around a shut-in gas well maintained the lease in force without the payment of delay rentals by the lessee. In Louisiana, the usual oil and gas lease provides for the payment of a sum of money called a bonus which maintains the lease in force for one year from its date. The lease also contains a clause known as the "unless clause" which provides that the lease will terminate at the end of one year unless the lessee either commences operations for the drilling of a well or pays a sum of money known as "delay rental" for the privilege of maintaining the lease in force for one more year without drilling a well. This privilege may be exercised each year during the primary term of the lease, which is the fixed number of years the lease may be held without production.

Louisiana, as one of the leading producers of oil and gas in the United States, has long recognized the necessity of conserving the State's natural resources. Commencing in the early years of the oil and gas industry, the Louisiana Legislature has adopted numerous statutes designed to avoid wasteful practices in the production of oil and gas. In 1940, the Louisiana Legislature adopted Act 157, known as The Oil and Gas Conservation Law of Louisiana. For the first time the Commissioner of Con-

servation was given adequate authority to prevent economic waste resulting from the drilling of unnecessary wells by combining or pooling separately-owned tracts of land or portions thereof into a single drilling unit and prohibiting the drilling of more than one well on the conservation unit thus created. Under the statute, the land included in such a unit "shall constitute a developed area as long as a well is located thereon which is capable of producing oil or gas in paying quantities." LSA-R.S. 30:9(B). It is the settled jurisprudence of Louisiana, based on this provision of the Conservation Statute, that the inclusion of a portion of the leased land in a unit around a shut-in gas well established by an order of the Commissioner of Conservation maintains the lease in effect until the end of the primary term without the payment of any delay rental. Although this provision of the Louisiana Conservation Statute and the cases of the Louisiana Supreme Court holding that the inclusion of a portion of a lease in a conservation unit around a shut-in gas well maintains the lease in effect without the payment of delay rentals were called to the attention of the District Court and the Court of Appeals, the District Court, without discussing the authorities relied on by Kellerman, rendered a judgment cancelling the lease for non-payment of delay rental and the Court of Appeals affirmed the judgment in a *per curiam* with the statements that:

> "* * * Under the requirements of the *Erie* doctrine, we must make the best guess possible as to the applicable law of the State of Louisiana.* * *

> "We have reached the conclusion that the trial court made a proper interpretation of the lease as to the payment of delay rentals and the default of the appellant-lessees in failing to make such payments according to the terms of the lease. We are unable to render any more reasonable interpretation of the lease after a meticulous consideration of the other possible interpretations of its provisions. * * *"

The error committed by the District Court and the Court of Appeals was their failure to recognize that the provisions of the lease were superseded by the order of the Conservation Commission under the settled jurisprudence of Louisiana.

The judgment rendered by the Court of Appeals has resulted in a gross miscarriage of justice in that it has deprived Kellerman of a producing oil and gas lease of great value. If the case had been tried in the Louisiana courts, this miscarriage of justice would not have occurred. If the judgment of the Court of Appeals is permitted to stand, those lessors who are able to litigate their disputes in the federal courts will be able to avoid the effect of an order of the Louisiana Commissioner of Conservation on the rental-paying provisions of their leases. In the past, this Court has granted writs of certiorari to review decisions of the United States Courts of Appeals under such circumstances pursuant to Supreme Court Rule 19(b). *Thompson v. City of Louisville,* 362 U.S. 199; *Fidelity Union Trust Company v. Field,* 311 U.S. 169. The Court of Appeals, by refusing to follow settled Louisiana law, has deprived petitioner of property of great value in a manner which urgently requires correction.

A. THE COURT OF APPEALS ERRED IN NOT GIVING THE SAME EFFECT TO THE ORDER OF THE COMMISSIONER OF CONSERVATION THAT WOULD HAVE BEEN GIVEN TO THE ORDER BY THE LOUISIANA COURTS.

The law is well settled in Louisiana that orders of the Commissioner of Conservation relating to drilling and production of oil are paramount, become the law of the case, and govern the rights and obligations of the parties despite conventional contractual obligations between the landowners and lessees. *Sohio Petroleum Company v. V. S. & P.R.R.*, 62 So.2d 615 (La. S.Ct. 1952); *Delatte v. Woods*, 94 So.2d 281 (La. S.Ct. 1957).

In the *Sohio* case, *supra*, the lease commenced on July 6, 1946 and contained the usual "unless clause" which provided that the lease would terminate on July 6, 1947, unless on or before such date the lessee either commenced the drilling of a well on the leased premises or paid a delay rental which would keep the lease in force for another year without drilling. The lessee paid no delay rental for the year commencing July 6, 1947. However, prior thereto the Commissioner of Conservation of Louisiana issued an order effective May 31, 1945, establishing a drilling unit including the leased premises and, in August, 1946, the drilling of a well was commenced on the unit but not on the leased premises. This well was completed and was capped on October 11, 1946, approximately nine months prior to the rental paying date. In 1950 the lessor sued to cancel the lease on the grounds that no drilling had been commenced

on the leased premises and no delay rental had been paid on or before July 6, 1947. The Louisiana Supreme Court refused to grant cancellation of the lease because of the lessee's failure to commence drilling or pay a delay rental before July 6, 1947 as required by the express provisions of the lease. The reason why the Louisiana Court refused to cancel any portion of the lease was because a portion of the lease had been included in a unit around a shut-in well by an order of the Commissioner of Conservation prior to the rental paying date. In reaching this conclusion, the Court stated:

> "Consequently, when the Kingwood-Jones No. 1 well was completed as a well capable of producing gas in paying quantities, within the year provided in the lease, *the area forming this drilling unit was considered to be a developed area within the meaning and contemplation of the act, and Article 5 of the lease is inapplicable.* In fact, another well could not have been drilled on this same unit without specific authorization, as secured in this case, i.e., by obtaining an order from the Commissioner of Conservation, following a full hearing and based upon his findings, warranting such exception to basic Order No. 96. It necessarily follows that the lease did not terminate for failure to pay rentals." *Sohio* case, *supra*, p. 620. (Emphasis supplied.)

The *Delatte* case, *supra*, presented a similar factual situation. On October 21, 1953, two days before the end of the primary term, the lessor and lessee entered into an agreement extending the lease for

one additional year commencing October 24, 1953, with a provision that the lease would terminate on November 24, 1953, unless the lessee commenced drilling on the leased premises or paid a delay rental of $1,000, which would extend for one month the time during which actual drilling may be commenced, with a further deferment of the commencement of drilling operations each month thereafter during the time as extended by the payment of said monthly delay rental. Prior to the execution of the amendment to the original lease on April 20, 1953, a gas well had been drilled, completed and shut-in by a third party on property adjacent to the leased premises. The Commissioner of Conservation of Louisiana issued an order, effective August 1, 1954, establishing a unit around the shut-in gas well on the adjacent property, which unit included a portion of the leased premises. The lessor sued to cancel the lease on the grounds that the inclusion of a portion of the leased premises in the unit around the shut-in well on the adjacent property did not satisfy the drilling or rental paying provisions of the agreement amending the original lease. In refusing to cancel the lease, the Court said:

> "Thus, the sole question before us is whether the basic Order No. 280-A of the Commissioner of Conservation, unitizing a portion of the leased land with other lands, designating Well No. 2 as the unit well, and limiting said unit to one well, constituted a production of oil, gas or other minerals affecting all lands within the said unit and thus relieved the defendant of any drilling operations towards production or the 'spudding

in' or commencement of actual drilling on any portion of the entire leased premises so as to have kept in full force and effect the lease here in controversy. We are constrained to hold in the affirmative.

* * *

"* * * The primary cause urged by all of the plaintiffs for the cancellation of their lease is that the unitization of a portion of the leased premises did not prevent or relieve the defendant Woods from the performance of the drilling obligation which he expressly assumed.

"It is firmly established in our jurisprudence that statutory authority is granted to the Commissioner of Conservation to create drilling developmental units and to integrate various tracts of various owners contained in such units, that the orders of the Commission supersede, supplement, replace and are incorporated in the provisions and obligations of contracts and leases relating to mineral development. LSA-R.S. 30:1 et seq. It necessarily follows that these orders become the law as between the parties in determining their respective rights and obligations.

"Sec. 8(b) of Act 157 of 1940, as amended, LSA-R.S. 30:9(B), authorizes the commissioner to establish drilling units so as to prevent waste and to avoid the drilling of unnecessary wells. The unit contemplated means the maximum area that might be efficiently and economically drained by one well, the owner of such tracts to share rateably according to their ownership. Such units constitute a developed area as long as a

well is located therein which is capable of producing oil or gas in paying quantities.

* * *

"Under these circumstances Unit B in which a portion of the leased premises was embraced constituted a developed area as defined by the conservation statute, supra, and therefore defendant Woods was relieved from any drilling obligation called for by his lease as extended on that portion of the leased premises embraced within said Unit B." *Delatte v. Woods, supra,* pp. 286-288.

The significance of the decisions in the above two cases is that the provisions of the leases were superseded by the orders of the Commissioner of Conservation which became the law as between the parties in determining their respective rights and obligations. Thus the lease provisions requiring the payment of delay rentals or the commencement of drilling operations to maintain the lease in effect were dispensed with because of the specific language of the Conservation Statute stating that the portion of the lease within the conservation unit constituted "a developed area as long as a well is located thereon which is capable of producing oil or gas in paying quantities." LSA-R.S. 30:9(B). The only limitation on the length of time the unitized area constitutes a developed area without production is found in *Landry v. Flaitz,* 157 So.2d 892 (La. S.Ct. 1963) which limited the effect of the inclusion of a portion of a lease in a conservation unit to the primary term of the lease and held that despite the conservation order

production was necessary to maintain the lease after the primary term.

The primary term of the Miller lease ended on May 5, 1959 but long prior to that date the well on the unit including the north half of the Miller Lease and the well on the unit including the south half of the Miller Lease were placed on production (R. 45, 46) and thereafter the lease was held by production pursuant to Paragraph 2 of the lease. (R. 60, 61.)

In the *Delatte* case, *supra,* the court held that the inclusion of a portion of a lease in a conservation unit on which there was a shut-in well maintained the lease in its entirety, both as to the acreage within the unit and as to the acreage outside the unit because the lease contained no express provision to the contrary. In the words of the Court, this holding was "based on the fundamental proposition well established in our jurisprudence that the lessee's obligation to drill a well is indivisable in its nature and the lessor's corresponding obligation to deliver the land is also indivisable, with the result that if the obligation of one is fulfilled in its entirety, then the obligation of the other is also fulfilled in its entirety." *Delatte v. Woods,* 94 So.2d 281, 288.

Under the Erie doctrine, the Court of Appeals was obligated to give the same effect to the order of the Commissioner of Conservation in this case as the Louisiana courts gave to the orders of the Commissioner of Conservation in the *Sohio* and *Delatte* cases. Consequently the Court of Appeals was obligated to recognize that the order of the

Commissioner of Conservation placing the north half of the lease in a unit around the Durke well, prior to the May 5, 1957 rental-paying date, superseded the delay rental provision and the drilling provisions of the lease and maintained the lease in force for the balance of the primary term without the payment of delay rentals or the conduct of drilling operations, both as to the area within the unit and as to the area outside the unit because there is no express language in the lease which changed the effect of the Conservation Order unless Paragraph 9 of the lease contained such language, which is denied for the reasons hereinafter stated.

The pooling of various leases, or portions thereof, to form a unit for the drilling of a single well by an order of the Commissioner of Conservation, pursuant to the Louisiana Oil and Gas Conservation Statute, proved so effective in preventing the drilling of unnecessary wells that lessees generally do not care to take a lease without an adequate and proper pooling clause which permits the lessee to join with other lessees in the formation of a voluntary unit with the same beneficial results for the lessee as a compulsory unit created by an order of the Commissioner of Conservation. The usual pooling clause gives the lessee the authority to pool or unitize the lease, or portions thereof, with other leases for the production of oil and gas, limits the acreage that may be included in such units and contains a stipulation that drilling operations on and production from any part of the pooled unit shall be treated as if such operations were on and production was from the land described in the lease regardless of whether or not the

well is located on the land covered by the lease. The commencement of a well on land in such a voluntary unit, even though not on the lessee's land, prior to a rental-paying date will maintain the lease in force without the payment of any delay rental. Since these pooling clauses vary from lease to lease, depending on the desires of the parties, a considerable body of jurisprudence has developed on the question of whether the formation of a voluntary unit was in strict compliance with the provisions of the pooling clause so that a well drilled on land in the unit but not on the leased premises will have the same effect as a well drilled on the leased premises and will maintain the lease in force without the payment of any rentals as long as the well continues to produce. It should be noted that in the case of a voluntary unit, the well must be produced to maintain the lease without the payment of rentals whereas in a compulsory unit created by an order of the Conservation Commission, the existence of a shut-in well on the unit will maintain the lease, a portion of which is in the unit, without production because of the specific language of the conservation statute. This discussion of voluntary unitization is necessary in order to show the fallacy of the reasoning of the District Court and the Court of Appeals. The District Court held that the inclusion of the north half of the Miller Lease in the conservation unit around the Durke well did not maintain the lease in force without the payment of delay rental because under the specific language of Paragraph 3 of the Miller Lease only a well drilled by the lessee on a conservation unit established prior to the commencement of drilling would maintain the lease in force without the payment of delay rent-

al. The District Court relied on the decision of the Louisiana Supreme Court in *Wilcox v. Shell Oil Company*, 76 So.2d 416 (La. S.Ct. 1954), which dealt with a voluntary unit as distinguished from a compulsory unit created by an order of the Conservation Commission. As pointed out by the Louisiana Supreme Court in *Delatte v. Woods, supra,* the holding in the *Wilcox* case has no application to a compulsory unit established by the Commissioner of Conservation. In that case, the Louisiana Supreme Court said:

"Plaintiffs place great reliance in the case of Wilcox v. Shell Oil Company, 226 La. 417, 76 So. 2d 416, as the basis for distinguishing the instant case from the decisions of this Court dealing with the effect of operations on or production from a unit area.

"The Wilcox case, supra, is readily distinguishable from the instant case. This distinction lies in the fact that the former case deals with the improper and unauthorized creation of a voluntary unit, the interpretation of a contract between the parties relating to the voluntary pooling clause contained therein, and the effect of operations on an improperly created and unauthorized voluntary unit.

"In the instant case we are called upon to deal with a unit compulsorily created by an order of the Commissioner of Conservation, and the interpretation and effect of a contract between the parties as to the obligations flowing therefrom but which has been substituted for and superseded by an order of the Commissioner of Con-

servation. It is apparent therefore that the Wilcox case is neither controlling nor analogous to that present here." *Delatte v. Woods, supra,* p. 289.

The decisions of the Louisiana Supreme Court in the *Sohio* and the *Delatte* cases, *supra,* make it clear beyond any doubt that the inclusion of the north half of the Miller Lease in the conservation unit around the shut-in Durke well prior to the May 5, 1957 rental-paying date maintained the entire Miller Lease in force without the payment of any delay rental until May 5, 1959, the end of the primary term, regardless of any contrary language in the Miller Lease, the provisions of which were superseded by the order of the Commissioner of Conservation. Prior to May 5, 1959, the Durke well in the unit including the north half of the Miller Lease and the Bernard well in the unit including the south half of the Miller Lease, were both placed on production (R. 45, 46). This maintained the lease in force as long as these wells produced as provided in Paragraph 2 of the lease (R. 60, 61).

B. THE COURT OF APPEALS ERRED IN HOLDING THAT SUFFICIENT RENTALS WERE NOT PAID PRIOR TO MAY 5, 1958 TO MAINTAIN THE ENTIRE LEASE IN FORCE, BUT, IN ANY EVENT, AT LEAST THE NORTH HALF OF THE LEASE WAS MAINTAINED BY ITS INCLUSION IN THE CONSERVATION UNIT AROUND THE SHUT-IN GAS WELL.

Paragraph 2 of the Miller Lease provides that it shall continue in force for three years, called "primary term" (R. 60, 61) from the effective date, which is May 5, 1956 (R. 58). However, Paragraph 3 pro-

vides that the lease shall terminate on May 5, 1957 unless on or before said date the lessee commences the drilling of a well or pays a delay rental of $3900. Under this language, the timely commencement of a well by the lessee, even though it turned out to be a dry hole one month later, would maintain the lease in force until May 5, 1958. Instead of commencing a well, the lessee paid the delay rental which was unnecessarily paid because prior to the rental date the north half of the lease was included in a conservation unit around the Durke well which, pursuant to the *Sohio* and *Delatte* cases, *supra*, held the entire lease until May 5, 1959, the end of the primary term, without payment of any delay rentals. Even if, as the District Court held, a delay rental payment of $7800 was required on or before May 5, 1958 to maintain the Miller Lease in force beyond that date, such requirement was satisfied by the $3900 unnecessarily paid on April 20, 1957 (R. 42), and the second $3900 paid on April 23, 1958 (R. 43). The District Court further erred in holding that certain language, taken out of context, in Paragraph 9 of the Miller Lease constituted a Pugh clause which divided the lease into two leases with the result that in order to maintain the lease after May 5, 1958, the lessee was required to pay "in lieu" royalty on the north half of the lease and to pay a delay rental on the south half of the lease. There is no provision in the lease for the payment of "lieu royalty" in a situation where a portion of the lease is included in a conservation unit around a shut-in well, and even if there were such a provision in the Miller Lease, the inclusion of the north half of the lease in the unit around the shut-in Durke well would have maintained the lease without the pay-

ment of any "lieu royalty" under the decisions in the *Sohio* case and the *Delatte* case. Thus, no payment of any kind was required to maintain the lease in effect as to the north half thereof on or before May 5, 1958. Even if the District Court was correct in holding that the language, taken out of context, in Paragraph 9 of the Miller Lease required the payment of $3900.00 on or before May 5, 1958 to maintain the south half of the lease in effect, this amount was paid on April 23, 1958 (R. 43) and, even under the District Court's interpretation of the lease, maintained the south half of the lease in force until May 5, 1959, at which time every acre of the lease was participating in production.

As pointed out hereinabove, the success of the Louisiana Oil and Gas Conservation statute in preventing the drilling of unnecessary wells by the formation of compulsory units led to the inclusion in oil and gas leases of a provision making it possible for the lessee to establish voluntary drilling units combining the lease or portions thereof with other leases or portions thereof with the result that drilling operations on any portion of the unit satisfied the drilling obligations of all leases, portions of which had been included in the voluntary drilling unit. In construing leases containing a provision permitting voluntary pooling, the Louisiana Courts have consistently held that where a portion of a lease has been included in a unit, production from the unit would continue the entire lease in force, whether or not the unit well was drilled on a portion of the leased acreage. The courts reason that because the obligation of the lessor and the lessee in an oil and gas lease are indivisible, production which would extend the term of

any portion of the lease would extend the entire lease. This result was objectionable to lessors and an additional clause was added to the leases, which came to be known as the Pugh clause named after the lawyer who is generally credited with having originated it. The Pugh clause provides in effect that production from a voluntary unit will not maintain that portion of the lease outside the unit and that the portion outside the unit can be maintained only by drilling or by the payment of a proportionately reduced delay rental. Generally speaking, an oil and gas lease without a voluntary pooling provision does not contain a Pugh clause. The Miller Lease not only does not contain a voluntary pooling provision, but it specifically prohibits the pooling of the leased premises with any other land without the written consent of the lessor. (R. 73.) Since the Miller Lease prohibits voluntary pooling, it was not necessary for it to have a Pugh clause as generally understood and there is no Pugh clause in the Miller Lease. The language in Paragraph 9 of the Miller Lease which the District Court construed as a Pugh clause, reads as follows:

> "* * * provided no portion of the leased premises shall be retained under a spacing or allocation order of the Louisiana Department of Conservation other than that portion located within the unit or units which have at that time been formed by the Louisiana Department of Conservation, and the inclusion of a portion of the lands herein leased in a unit or units shall not be deemed sufficient to hold the remainder of the

lands not included in said units without the compliance with the requirements of this lease for the retention of the privileges herein granted, * * *" (R. 72).

The above language is contained in a proviso which refers to the language preceding it and when the whole of Paragraph 9 (R. 71-73) is read together, it is seen that it deals only with the situation where the lessee, after having begun "to exploit the premises as understood herein" decides to discontinue drilling operations, in which event the lessee is granted the right to retain certain acreage around wells which are producing or which are capable of producing. Under the settled rules of statutory construction, every portion of Paragraph 9 must be read together with every other portion to determine the meaning of Paragraph 9. There is no evidence in the record to show that Kellerman ever decided to discontinue operations and ever selected any acreage to be retained around any well. Consequently, Paragraph 9 cannot be construed to have the effect of dividing the Miller Lease into two leases so as to require the payment of delay rentals to maintain the south half of the lease in force. No Louisiana court has ever held that language similar to the language in Paragraph 9 relied on by the District Court divided a lease when only a portion thereof was included in a unit established by an order of the Commissioner of Conservation. In *Smith v. Carter Oil Company*, 104 F. Supp. 463 (W.D. La. 1952), the lease contained a voluntary pooling provision with a Pugh clause. A well was drilled on a unit including a por-

tion of the leased premises but not on the leased premises. The lessee did not create the unit by declaration, but obtained a forced pooling order from the Commissioner of Conservation. The court held that since the lessee had not invoked the pooling clause, the provisions in that clause for the division of the lease were not applicable and that, therefore, the lease remained an indivisible contract which was maintained in force by unit production as to the lands both within and without the unit. By the same reasoning, since there is nothing in the record to show that Kellerman has invoked the provisions of Paragraph 9 or ever decided to discontinue operations under the lease or ever selected any acreage to be retained around producing or shut-in wells, the provision in Paragraph 9 relied on by the District Court was not applicable and consequently the lease remained an indivisible contract which was maintained in force during the primary term in accordance with the decisions in the *Sohio* and *Delatte* cases, *supra*.

However, even if the Court of Appeals was correct in deciding that a portion of a sentence in Paragraph 9 of the lease constitutes a Pugh clause with the result that delay rental payments were required to maintain the south half of the lease in effect and that such rental payments were not sufficient, the Court of Appeals was obligated to give the same effect to the inclusion of the north half of the lease in a conservation unit as would be given to such an event by the courts of Louisiana. There is no conflict in the Louisiana decisions on this question and the law is well settled by the *Sohio* and *Delatte* cases that when a portion of a lease is included in

a unit around a shut-in well by an order of the Commissioner of Conservation, it is constituted a developed area by Section 8 (b) of the Louisiana Conservation Law and the lease is maintained in effect without the payment of delay rentals or drilling operations "as long as a well is located therein which is capable of producing oil or gas in paying quantities." LSA-R.S. 30:9(B). This provision of the Louisiana Conservation Statute supersedes any provision of the lease in conflict therewith. Consequently, there was no question but that the north half of the lease was maintained in effect throughout the primary term without the payment of any delay rental or the undertaking of any drilling operations by the lessee. Before the end of the primary term the unit well was placed on production which served to continue the lease in force. Under the Erie doctrine, the Court of Appeals was obligated to refuse to cancel the lease at least as to the north half thereof.

C. IF KELLERMAN FAILED TO PAY THE CORRECT RENTAL, THE COURT OF APPEALS ERRED IN REFUSING TO LET KELLERMAN CORRECT THE ERROR OR, IN THE ALTERNATIVE, IN REFUSING TO HOLD THAT MILLER HAD WAIVED HIS RIGHT TO HAVE THE LEASE CANCELLED BY REMAINING SILENT FOR ALMOST FIVE YEARS AFTER ACCEPTING PAYMENT OF THE DELAY RENTAL.

It seems clear, under the doctrine announced in the *Sohio* and *Delatte* cases, *supra*, that the inclusion of the north half of the Miller Lease in the conservation unit around the Durke well maintained

the entire lease in effect without the payment of any delay rental during the primary term of the lease. However, if the Court of Appeals was correct in holding that payment of delay rental was necessary to maintain the south half of the lease and that sufficient delay rental was not timely paid, the Court of Appeals erred in not giving Kellerman a reasonable opportunity to correct the mistake after notice of the error in the rental payment, as was done by the Louisiana Supreme Court in *Jones v. Southern Natural Gas Company*, 36 So.2d 34 (La. S.Ct. 1948).

In the *Jones* case the original lease covered approximately 518 acres and provided for an annual delay rental of $1.00 per acre. The lease also provided that in the event of an assignment of a portion of the lease, the rental payments were to be apportioned ratably according to the surface areas held by assignor and assignee. The defendant acquired a portion of the lease by assignment and paid the lessee $300 as the delay rental due for 1944. Defendant arrived at this amount by computing the area which it believed it had acquired by the assignment. The lessee accepted this payment without protest. Shortly prior to the rental paying date in 1945, the defendant again paid the lessee the sum of $300 as delay rental and approximately one month after receipt of this payment, the lessor notified defendant that the correct delay rental was $322.63 and demanded a release of the lease on the grounds that it had terminated for non-payment of the correct delay rental for 1944 and 1945. Approximately three

months thereafter, defendant mailed its check to the lessor for the difference between the amount it had paid as delay rental for those two years and the amount claimed by the lessor to have been due. Thereafter, the lessor sued for cancellation of the lease for non-payment of the proper delay rental. The evidence showed that several different surveys had been made of the portion of the lease assigned to defendant and each survey showed a different acreage for the portion of the lease assigned to defendant. The court refused to grant cancellation of the lease because it felt that the lessee had made a reasonable mistake in the payment of the delay rental and should have a reasonable time after receiving notice from the lessor of the incorrect payment within which to rectify the error. In arriving at this conclusion the court said:

> "There is ample authority for the proposition that considerations of equity may prevent a forfeiture of a mineral lease where the failure of the lessee to pay the full amount of the delay rentals, or his failure to pay it within the time stipulated, is the result of a mistake on his part, and where the circumstances are such that the mistake is a pardonable one, and particularly where the mistake is a mutual mistake on the part of both the lessor and the lessee. In such cases equity requires that when the lessor learns of the mistake he should promptly inform the lessee of the mistake and give the latter an opportunity to correct it immediately, before he, the lessor, can demand a forfeiture for nonpayment of the rental within the time stipulated. See *Monarch Gas Co. v.*

Roy, et al, 81 W.Va. 723, 95 SE 789; and *Gloyd v. Midwest Refining Co.*, 10 Cir., 62 F. 2d 483." *Jones v. Southern Natural Gas Company, supra*, p. 38.

If there was ever a case where the amount of delay rental due, if any, under an oil and gas lease was uncertain, it is the case which is the subject of this application for a writ of certiorari. Obviously, the Court of Appeals had difficulty in determining what delay rentals, if any, were due for the year commencing May 5, 1957 and for the year commencing May 5, 1958, because approximately two months after the case was argued, the Court suggested that the parties file supplemental briefs discussing those provisions of the lease pertaining to the lessees' drilling obligations and the penalties for the breach thereof. There was no need for considering those provisions of the lease unless the lease had been maintained in effect by the inclusion of a portion thereof in the conservation unit around the Durke well, pursuant to the decision in the *Sohio* and *Delatte* cases, *supra*, or unless the Court of Appeals felt that the lease had been maintained in effect by the payment of proper delay rentals, or by a combination of the two events. The District Court likewise had difficulty in determining the amount of delay rental, if any, that was due on May 5, 1958 as evidenced by the fact that after all the briefs had been filed the District Court directed two letters to counsel dated February 11th and 13th, 1964, requesting supplemental memoranda on certain questions including the question as to whether any delay rental was due under Paragraph 3 of the lease after

the inclusion of the north half of the lease in the conservation unit. (R. 202) The difficulty which both the Court of Appeals and the District Court had in determining whether the proper amount of delay rental had been paid for the year commencing May 5, 1958 is all the proof that is needed to show that there was great uncertainty in the minds of the Court concerning the amount of delay rental, if any, due for the year 1958. Surely, if the Court of Appeals and the District Court, after months of study, had such difficulty deciding the rental question, Kellerman can be pardoned for having made a mistake in the delay rental payment for 1958, and should be given an opportunity to correct the erroneous payment pursuant to the holding of the Louisiana Supreme Court in the *Jones* case, *supra.*

The Court of of Appeals' affirmance of the District Court's refusal to apply the equitable doctrine of the *Jones* case, *supra,* is apparently based on the District Court's reasoning that the delay rental provisions of the Miller Lease were so clear and unambiguous that there was no basis for an erroneous payment. The District Court sought to distinguish this case from the *Jones* case on the grounds that in the *Jones* case the amount of delay rental was rendered uncertain because of a conflict in surveys showing the amount of acreage covered by the lease whereas in this case and the cases cited by the District Court (R. 204), the exact amount of the delay rental was stated in the lease. The error committed by the District Court and concurred in by the Court of Appeals was in failing to recognize that under

the doctrine of the *Sohio* and *Delatte* cases, *supra*, the delay rental provision of the Miller Lease was superseded by the conservation order which placed the north half of the lease in the conservation unit around the Durke well. According to the *Delatte* case no delay rental was due thereafter on any portion of the lease unless certain language in Paragraph 9 divided the lease into two leases so as to require the payment of delay rental to hold the south half of the lease. It is Kellerman's contention that if any delay rental was necessary to hold the south half of the lease, which is denied, sufficient delay rental was paid. In any event, the amount of delay rental, if any, due for the year 1958 was so uncertain after the issuance of the conservation order that the Court of Appeals erred in not applying the doctrine of the *Jones* case, *supra*. The cases relied on by the District Court in refusing to apply the doctrine of the *Jones* case are not at all pertinent because in those cases (1) the lessee paid absolutely no rental to the lessor and (2) made no effort to pay any rental after being given notice of the failure to pay and (3) the rental provisions of the leases had not been superseded by an order of the Commissioner of Conservation as in the case under discussion. Although the Court of Appeals in its *per curiam* commented on the irreconcilable conflicts in the oil and gas law in Louisiana, there is no case in Louisiana where the court has cancelled a lease for non-payment of delay rental where the lessee has in good faith made some rental payment after a portion of the lease has been included in a con-

servation unit around a shut-in gas well as was the situation in this case.

In addition to the Court of Appeals' error in failing to apply the doctrine of the *Jones* case, *supra,* the court also erred in failing to follow the settled Louisiana law that the lessor may be estopped or may waive his right to have a lease cancelled for failure to pay the correct amount of delay rental where the lessor fails to complain about the improper payment until after the lessee has drilled a well or wells on the leased property. There is no conflict as to the law of Louisiana in this situation. There is no Louisiana case which has decreed cancellation of an oil and gas lease for non-payment or improper payment of delay rentals where the lessor has remained silent until after the expiration of the primary term and has accepted royalty payments from wells on the leased land or on a unit including the leased land. On the other hand, the Louisiana Supreme Court in *Dellinger v. Smith,* 77 So. 947 (La. S.Ct. 1918), and *Risinger v. Arkansas-Louisiana Gas Co.,* 3 So.2d 289 (La. S.Ct. 1941), refused to cancel a lease for non-payment of delay rental after the lessee had drilled a well on the land. Under Section 8(b) of the Louisiana Conservation Statute, LSA-R.S. 30:9(B), the inclusion of the north half of the lease in this case in a conservation unit around a shut-in gas well had the same effect as though the lessee had drilled on the leased land. Consequently, the court violated the Erie doctrine in failing to apply the doctrine of the *Dellinger* case and the *Risinger* case to the facts in this case where the lessor waited almost five years after the

alleged incorrect payment and more than four years after every acre of the lease had been participating in production before complaining about the alleged error in the delay rental payment.

The error committed by the District Court and the Court of Appeals in this case resulted from the failure of these Courts to give any effect to the order of the Commissioner of Conservation of Louisiana, which order included the north half of the Miller Lease in a unit around the shut-in Durke well. Under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 78, these Courts were obligated to give the same effect to the order of the Commissioner of Conservation as would have been given to such order by the Louisiana courts. Under the decisions in the *Sohio* and *Delatte* cases, *supra,* the inclusion of the north half of the Miller Lease in a unit around the shut-in Durke well, pursuant to the order of the Commissioner of Conservation, maintained the entire lease in effect during the primary term without the payment of any delay rental. The minimum effect that can be given to the order of the Commissioner of Conservation is that the inclusion of the north half of the Miller Lease in the unit around the Durke well maintained only the north half of the lease in effect without the payment of delay rentals, although there is no Louisiana jurisprudence justifying this limitation of the effect of the order of the Commissioner of Conservation. Petitioners feel very strongly that the entire lease was maintained in effect by the order of the Commissioner of Conservation without the payment of any delay rental and certainly there

is no justification for cancelling the lease insofar as the north half thereof is concerned.

CONCLUSION.

WHEREFORE, petitioners pray that a writ of certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Fifth Circuit in R. E. Kellerman, et als v. Preston J. Miller.

Respectfully submitted,

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April, 1966.

STATUTE INVOLVED.

§ 9. Production from pool; drilling units; equitable share; rules and regulations

* * * * * *

B. For the prevention of waste and to avoid the drilling of unnecessary wells, the commissioner shall establish a drilling unit or units for each pool, except for those pools which, prior to July 31, 1940, had been developed to an extent and where conditions exist making it impracticable or unreasonable to use a drilling unit at the present stage of development. A drilling unit, as contemplated herein, means the maximum area which may be efficiently and economically drained by one well. This unit shall constitute a developed area as long as a well is located thereon which is capable of producing oil or gas in paying quantities. . . . L.S.A.-R.S. 30:9(B). As amended Acts 1960, No. 442, § 1.

PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21738

R. E. KELLERMAN, ET AL.,
Appellants,

versus

PRESTON J. MILLER,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(December 16, 1965.)

Before WOODBURY,* JONES and GEWIN, Circuit Judges.

PER CURIAM: This diversity case presents difficult questions of law under a mineral lease of a 78 acre tract of land located in the State of Louisiana. The trial court correctly observed, "The undeniable fact is that with only 78 acres included in the lease, the form of the lease was just not suitable for operations in a gas area." The United States District Court for the Western District of Louisiana rendered summary judgment cancelling the lease in a suit filed by the lessor. *Miller v. Kellerman*, 228 F.Supp. 446 (W.D. La. 1964).

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* Senior Judge of the First Circuit, sitting by designation.

Under the requirements of the *Erie* doctrine we must make the best guess possible as to the applicable law of the State of Louisiana. This task is not without serious difficulty. The Louisiana cases deal with a variety of factual situations and numerous types of leases containing provisions peculiarly suited to the property involved in the individual leases. We are not critical of the Louisiana decisions, but the case law on the subject of oil and gas leases is not as clearly defined as it is in other areas. There are a wide variety of opinions and interpretations apparent from the cases and legal commentaries.

At the suggestion of this court the parties filed extensive and very helpful supplemental briefs. We have given careful and tedious consideration to all the contentions of the parties. Such contentions are widely divergent and reflect irreconcilable conflicts as to the law of Louisiana. It seems appropriate to note that the parties themselves have taken inconsistent positions at various stages of the proceedings.

We have reached the conclusion that the trial court made a proper interpretation of the lease as to the payment of delay rentals and the default of the appellant-lessees in failing to make such payments according to the terms of the lease. We are unable to render any more reasonable interpretation of the lease after a meticulous consideration of the other possible interpretations of its provisions. The opinion of the trial court reflects a cautious and careful consideration of the equitable principles involved. We are unable to disagree with his interpretation,

or to find any improper application of these principles in the exercise of a wise discretion which must guide the court in the circumstances and under the facts presented in this case. As pointed out by the trial court, it discussed some matters which it deemed unnecessary to consider in order to arrive at the conclusion reached, but attention was given to such matters because of their possible bearing on "the equities involved." Upon consideration of the entire record, we conclude that there was no error which would require a reversal. Accordingly, the judgment is AFFIRMED.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21738

D. C. Docket No. 8645—Civil Action

R. E. KELLERMAN, ET AL,

Appellants,

versus

PRESTON J. MILLER,

Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

Before WOODBURY,* JONES and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, R. E. Kellerman, and others, be condemned, in solido, to pay the costs of this Court for which execution may be issued out of the said District Court.

December 16, 1965.

Issued as Mandate: Feb. 2, 1966.

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* Senior Judge of the First Circuit, sitting by designation.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DENYING PETITIONERS' PETITION FOR REHEARING AND REHEARING *EN BANC.*

[462]—Gewin

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21,738

R. E. KELLERMAN, ET AL.,
Appellants,

versus

PRESTON J. MILLER,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana

---

(January 25, 1966)

ON PETITION FOR REHEARING

Before WOODBURY,* JONES and GEWIN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1192

R. E. KELLERMAN, TED WEINER and NICHOLS & COMPANY,

Petitioners,

versus

PRESTON J. MILLER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DOMENGEAUX & WRIGHT,
JAMES DOMENGEAUX,
FREDERIC G. HAYES,
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Lafayette, Louisiana,
Attorneys for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 1192.

R. E. KELLERMAN, TED WEINER and NICHOLS & COMPANY,

Petitioners,

versus

PRESTON J. MILLER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MAY IT PLEASE THE COURT:

Respondent, Preston J. Miller, respectfully submits this brief in opposition to petitioners', R. E. Kellerman, Ted Weiner and Nichols & Company, application for a writ of certiorari to review the judgment of the United States Court of Appeals, Fifth Circuit, entered on December 16, 1965, rehearing denied January 25, 1966.

STATEMENT OF THE CASE.

This is a dispute between private parties, citizens of the State of Texas and the plaintiff-respondent

herein, Preston J. Miller, a citizen of Vermilion Parish, Louisiana. This suit was filed in the Louisiana District Court of Vermilion Parish, Louisiana, and was removed by the petitioners herein to the United States District Court. Respondent, Preston J. Miller, granted an oil and gas lease to petitioner, R. E. Kellerman, dated May 5, 1956. Interests in the lease were assigned to petitioners, Ted Weiner and Nichols & Company, hereinafter referred to as "Kellerman" and the defendants-petitioners herein, have never taken any action whatsoever to the drilling of a well or other development of the Miller Lease premises and assert that they had no legal obligation so to do.

The Miller Lease provides for a primary term of three years, commencing May 5, 1956, and contains the customary "unless clause" which provides for the automatic termination of the lease at the end of the first year *unless* the lessee commenced the drilling of a well on the land or on acreage pooled therewith or paid a delay rental of *$3,900.00;* only in which event would the lease be kept in effect until May 5, 1958, at which time a payment of *$7,800.00* would be due to maintain the lease for another year, or until May 5, 1959, without drilling. Kellerman deposited $3,900.00 to the account of Preston J. Miller prior to May 5, 1957, and again deposited only $3,900.00 prior to May 5, 1958. The pertinent language of the Miller Lease is found in Paragraph 3 thereof, which provides as follows:

> "*This lease shall terminate* on the 5th day of May, 1957, *unless* on or before said date the lessee either (1) commences the drilling (spudding in)

> of a well on the land *or on acreage pooled therewith after notice and hearing* pursuant to an order of the Louisiana Department of Conservation, in search of oil, gas or other minerals and thereafter continues such operations and drilling to completion or abandonment; or (2) pays to the Lessor a rental of Three Thousand Nine Hundred and No/100 ($3,900.00) Dollars, which payment shall maintain Lessee's right in effect without drilling operations for one (1) year from the date last above mentioned: and Lessee may continue to maintain the rights granted without drilling operations for successive twelve (12) months' (sic). (during the primary term) by paying Lessor on or before the beginning of such respective periods *Seven Thousand Eight Hundred and No/100 ($7,800.00) Dollars for the land to be held hereunder by rental payment.* Payments may be made to the Lessor or may be mailed or delivered for deposit to Lessor's credit in The First National Bank of Abbeville, ..." (R. 61.)

Thus, when only $3,900.00 instead of the $7,800.00 due was paid, the lease terminated on May 5, 1958 under its own terms.

On March 4, 1957, the Durke Well was drilled approximately 2,440 feet north of the Miller Lease (R. 40) and a Conservation Order No. 367 was issued as to the upper stratum or productive sand which underlies the Miller Lease property only, namely the Cristellaria 6 Sand, the unit for which are set forth pursuant to this order (R. 86) by a plat filed in the

record at R. 90, which was revised by another plat, shown at R. 85.

There are five productive sand strata which underlie the Miller Lease property, and this Conservation Order affected only one stratum, namely that "between the depths of 11,552 feet and 11,682 feet and the correlatives thereto in other wells" as defined in Order No. 367, under "Definition" and set forth at R. 86. The four deeper sands which underlie the Miller Lease premises are, in order of depth:

Cristellaria -6 Sand, (C-6)

Siphonini-davisi-1 Sand, (SD-1)

Siphonini-davisi-2 Sand, (SD-2)

Siphonini-davisi-3 Sand, (SD-3)

Siphonini-davisi-4 (Nunez) Sand, (SD-4).

all as shown on Plat I, which is annexed as appendix p. 35.

Thus, at the time the due date of the first delay rental, May 5, 1958, only the northern half of the *uppermost* (C-6) Sand was contained in the Conservation Unit and there was no drilling or development of either the southern half of the uppermost sand or any of the deeper sands, by unitization or by actual drilling of wells. Therefore, the defendants-petitioners, Kellerman, deposited $3,900.00 to the bank account of Miller before May 5, 1958. The Durke Well

was completed in both the upper (C-6) Sand as well as the lower SD-1 Sand, which was not unitized, however, the Durke Well did not produce from either of these sands until *May 25, 1958,* after the second delay rental due date of May 5, 1958 (Stipulation IV, R. 41).

Thus, the situation was as shown on Plat II, appendix p. 36, at the time that the first delay rental was paid by check deposited to the account of Miller.

In the course of the next year, a Conservation Order was granted prescribing drilling units for the SD-1 Sand, so that the Miller Lease was pooled into two units as to the C-6 and SD-1 Sand, but not as to any units as to the lower three sands, the SD-2, SD-3 and SD-4 (Nunez) Sands, on May 5, 1958.

There was no drilling by the defendant-petitioners herein or others on the unit and there was no production from the Durke Well until 20 days after the delay rental date (Stipulation IV, XII; R. 41, R. 44) and although Paragraph 3, quoted above, clearly states that the amount of $7,800.00 was due, only $3,900.00 was deposited to Miller's bank account prior to May 5, 1958 (Stipulation IX, R. 43).

Thus, at the time that only one-half the amount due was paid the situation was as shown on Plat III, appendix p. 37.

The defendants-petitioners herein never drilled to develop any part of the Miller Lease, but drilling was done by other companies on the unitized acreage as follows:

On July 19, 1958 Superior Oil Company commenced drilling the Bernard Well, approximately 390 feet west of the Miller land, which struck the deeper sands, the SD-2 and SD-3 sands at a point 390 feet away from Miller's property, which sands were not unitized by an order of the Conservation Department until after suit was filed, and the defendants-petitioners herein, Kellerman et al., never attempted to drill to these deeper sands or to develop them.

Other wells were drilled surrounding the Miller Lease property to these deeper non-unitized sands as shown on the attached Plats, 4, 5 and 6, so that at the time of filing the petition, Miller's property was surrounded by wells capable of producing from these deeper sands.

Only the upper two sands, the C-6 and SD-1 sands were unitized, and only a pittance of the possible production surrounding the Miller Lease premises was obtained by Miller.

Miller addressed a letter to Kellerman on November 16, 1961, demanding that the Miller Lease be released, which was refused by Kellerman, and on December 28, 1961, suit was filed in the Louisiana court to have the lease declared cancelled. Kellerman et al. removed the suit to the United States District Court for the Western District of Louisiana, and filed a motion for summary judgment, with attached exhibits (R. 27).

From the attached Df. Exhibit "B" (see R. 79, Stip. IX, R. 43) for the first time, Miller learned that

the improper ($3,900.00) delay rental had been deposited to his bank account prior to May 5, 1958 and filed a supplemental petition for judgment determining that the lease automatically terminated for improper payment of delay rental at that time (R. 28), which petition was further supplemented and amended (R. 30) and to which the defendants, Kellerman et al., answered admitting that only $3,900.00 was paid, but asserting that the payment of $3,900.00 on or about April 23, 1958, constituted full payment of the delay rentals due plaintiff on or before May 5, 1958 under the terms of the lease (R. 33, Par. I) and specially pled the prescription of three years for the collection of the balance due (R. 34, Par. IV).

When, after the discovering from the exhibits filed by Kellerman et al., in connection with their motion for summary judgment, that only one-half of the $7,800.00 due as delay rentals before May 5, 1958, had been deposited to Miller's bank account in Abbeville, attorneys for Miller transmitted his check to Kellerman in the amount of $3,900.00 as a refund of the delay rental payment made on April 23, 1958, and in addition delivered Miller its check for $3,900.00, not as an unconditional tender of payment and recognizing its mistake, but with the flat statement that payment of this amount should not be considered *as an admission of any error:*

> "We believe that there is a serious question as to whether or not this additional rental payment is due under the lease, but the payment is being made to you in order to protect our clients' rights under the above lease. Payment of this amount should *not be considered as an admis-*

> *sion of any error* and the prior payment of delay rentals by our clients. Furthermore, our clients *fully reserve their rights to obtain a judicial determination* as to the necessity of this additional payment in pending litigation filed by you or in other appropriate judicial proceedings." (R. 177, line 15 et seq.)

and indeed pled the prescription of three years as a bar to the collection of the additional $3,900.00 delay rental due by Miller. (R. 34 line 12: IV).

> "Defendants specially plead the prescription of three (3) years for the collection of amounts due as rentals."

The lease was declared terminated as of May 5, 1958, when the District Court concurred that the improper delay rental had been paid, under the doctrine of *Johnson v. Smallenberger,* 237 La. 11, 110 So. 2d 119 which states that according to the plain provisions of the type of contract known as the "unless lease", the Lessee is under no duty either to drill or to pay delay rentals, but that if he neither drills nor pays the lease ipso facto terminates at the time of default (R. 207; 204). The District Court carefully distinguished the *Jones* case, city by petitioners herein, at R. 204 to R. 206, pointing out:

> "We emphasize that the circumstances warranting application of equity must appear with convincing clarity. Here, the lease stated in dollars and cents the exact amount of the annual rentals ($7,800) and there have been no segregated part of the land covered by the lease. The

payment of only $3,900 was not a likely or reasonable mistake." (R. 206, line 12.)

". . . This opinion has been lengthy, but its thesis is simple: The lease was at an end immediately upon non-payment of the proper rental on May 5, 1958. According to the plain provisions of the 'unless' lease, as universally interpreted, the lessee is under no duty to either drill or pay: if he either drills or pays the lease remains in effect, but if he does neither, it ipso facto terminates. The mere discovery of oil and unitization does not suffice. There must be production." (R. 219, line 14 et seq.)

The application for a new trial was denied (R. 223) and appeal was taken to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment below:

"We have reached the conclusion that the trial court made a proper interpretation of the lease as to the payment of delay rentals and the default of the appellant-lessees, in failing to make such payments according to the terms of the lease. We are unable to render any more reasonable interpretation of the lease after a meticulous consideration of the other possible interpretations of its provisions. The opinion of the trial court reflects a cautious and careful consideration of the equitable principles involved. We are unable to disagree with his interpretation, or to find any improper application of these principles in the exercise of a wise discretion which must guide the court in circumstances and under the

facts presented in this case." (See pages 37, 38 of appendix, petitioners' brief herein.)

The motion for new trial was denied and petitioners-defendants-appellants below have applied for certiorari to this court.

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

Petitioners' application for a writ of certiorari is premised on the argument that the judgment rendered by the United States District Court, which was subsequently affirmed by the Court of Appeals for the Fifth Circuit, results in the application of one rule of law for litigants in the state courts of Louisiana, where the effect of an Order of the Louisiana Commissioner of Conservation is concerned, and another rule of law for those litigating the same question in the Federal courts.

It is respectfully submitted that the Court of Appeals and the United States District Court followed well settled Louisiana law and correctly applied same to facts and issues presented by this case. This is all that is required under the *Erie* doctrine and renders unnecessary the invocation of this Honorable Court's jurisdiction on writ of certiorari.

I. THE ORDER OF THE COMMISSIONER OF CONSERVATION DID NOT SUPERSEDE THE "UNLESS CLAUSE" OF THE MILLER LEASE.

Petitioners, Kellerman, have advanced the argument that the Court of Appeals erred in holding that

the Miller Lease terminated under the "unless clause", notwithstanding the Order of the Commissioner of Conservation. In support of this argument, the cases of *Sohio Petroleum Company v. U. S. & P. R. R.*, 62 So. 2d 615 (La. S. Ct. 1952), and *Delatte v. Woods*, 94 So. 2d 281 (La. S. Ct. 1957) are cited for the proposition that the inclusion of a portion of a lease in a conservation unit around a shut-in gas well maintains the lease in effect without the payment of delay retails.

Before distinguishing the *Sohio* and *Delatte* decisions, *supra*, there are certain features of the "unless clause" as interpreted by the Louisiana Courts, that merit discussion.

When the "unless clause" is used, as it was in Paragraph 3 of the Miller Lease (R. 61), the lessee *does not* covenant or obligate himself to drill or pay delay rentals. However, the failure of the lessee to drill or pay the stipulated delay rental automatically terminates the lease. *Baker v. Potter*, 223 La. 274, 65 So. 2d 598 (La. S. Ct. 1953); *Amos v. Waggoner*, 229 La. 134, 85 So. 2d 58 (La. S. Ct. 1956); *Johnson v. Smallenberger*, 347 La. 11, 110 So. 2d 119 (La. S. Ct. 1959); *Rushing v. Griffin*, 240 La. 31, 121 So. 2d 229 (La. S. Ct. 1960); and *Broussard v. Phillips Petroleum Co.*, 160 F. Supp. 905 (1958), affirmed per curiam 265 F. 2d 221 (CCA, 5th, La. 1959). Accordingly, as demonstrated by the above cited authorities, the lessee has three (3) options as distinguished from the obligations, which he covenants under the further terms of the lease: (1) to drill, (2) or to pay the stipulated delay rental, (3) terminate the lease by doing nothing.

In addition to the interpretation of the "unless clause", as enunciated above by the Louisiana Courts, the mode of exercising the options to drill, pay delay rentals, or terminate the lease, depends entirely upon the terms of the lease, and the type of conservation unit.

In the instant case, Paragraph 3 of the Miller Lease (R. 61) provided for the termination of the lease "unless * * * the Lessee either (1) commences the drilling (spudding in) of a well on the land, or on acreage pooled therewith after notice and hearing pursuant to an order of the Louisiana Department of Conservation * * *" or pays a stipulated delay rental, (R. 61). The word "after" in this paragraph is paramount in determining the effect of the conservation unit on the drilling option, and renders the *Sohio* and *Delatte* decisions, *supra,* inapplicable to the facts of the instant case.

In the *Delatte* case, *supra,* the court had before it the following lease provisions:

> "The lease in controversy contained the customary stipulation that if operations for the drilling of a well should not be commenced within one year from its date the same should terminate as to both parties unless on or before its anniversary date the lessee should pay or tender to the lessor or deposit to his credit in a designated bank $50 per acre, or $3,000 per year, which would cover the privilege of deferring commencement of drilling operations for an additional period of twelve months.

"The original lease further provided that it should remain in force for the primary term of two years from date and as long thereafter as oil, gas or any other minerals are produced therefrom or production is had from any part of the acreage with which said leased premises is pooled, in which latter event the lessee's drilling obligation becomes fulfilled by such production.

"It further provided that upon the completion of a well capable of producing gas in commercial quantities which was not being sold or utilized off the premises, the lessee shall pay lessor at the rate of $200 per year, payable quarterly, for such time as said gas is not sold or utilized off the premises, and that such payment would be construed as production of gas from said land.

"*It is further stipulated* in said lease that '*Lessee, at its option, is hereby given the right* and power without Lessor's joinder *to pool* or combine the acreage, royalty, or mineral estate covered by this lease, or any portion thereof, with other land, lease or leases, royalty and mineral estates in the immediate vicinity thereof, when, in Lessee's judgment, it is necessary or advisable to do so in order to properly develop and operate said leased premises so as to promote the conservation of oil, gas or other minerals in and under that may be produced from said premises, * * *'. And that '*Drilling or reworking operations* on or production of oil, gas, sulphur or other minerals *from land included in such pooled unit shall have the same effect in continuing this lease*

in force and effect during or after the primary term *as to all of the land covered hereby as if such operations were on or such production were from land covered hereby.'* And that 'In the event that any part of the land herein leased is now, or by assignment or otherwise hereafter may become, segregated from any other part, commencement of operations for the drilling of a well, the drilling of any well, and/or the production of oil, gas, sulphur or other minerals or casinghead gasoline on any part of the above-described land or any acreage pooled therewith, shall protect and hold under this lease all tracts of said land whether segregated or not.'"

Delatte v. Woods, 94 So. 2d 281, at pages 283, 284. (Emphasis added.)

It is readily apparent that the lease in the *Delatte* case, *supra,* specifically provided that drilling operations on any part of the lease premises or acreage pooled therewith satisfied the drilling provision of the "unless clause". Furthermore, the latter quoted provision of the *Delatte* lease, rather than containing a "Pugh Clause", as found in the Miller Lease (R. 71), specifically provided that drilling on acreage pooled with the leased premises had "the same effect in continuing this lease in force and effect during or after the primary term as to all of the land covered by the lease." Most critical, however, is the absence in the *Delatte* case, *supra,* of any limitation as to whether or not the drilling option may be exercised before or after pooling of the leased premises with adjacent tracts of land.

The "Pugh" Clause of a lease will divide the unitized leases and stratum from the balance of the lease so that full delay rentals are due; which "Pugh" Clause is recognized by the *Delatte v. Woods* decision, 232 La. 341, 94 So. 2d 281 at pages 288, 289.

In this case, at the time of the non-payment of the proper delay rental on May 5, 1958, when the Miller Lease automatically terminated under its provisions, there was in effect only a Conservation Order as to the two uppermost productive sand strata of the Miller Lease (See Plat I, appendix p. 35 and Plat III, appendix p. 37).

It is well settled in the Louisiana jurisprudence that in the event there is no conservation order as to deeper sands:

> "In the absence of no geological facts to the contrary (and, it should be noted, in the absence of payment and acceptance of delay rentals) *the remaining portions* of the leased premises should also be developed if the exploratory well is completed as a producer. This covenant is for the protection of the lessor against two kinds of harms which conceivably could transpire: (a) Failure to drill enough wells might result in the permanent loss of oil, and (b) A slower rate of production might result in a deprivation of the use of the capital represented by the unproduced royalty oil."

The impact of conservation laws and the impact of decisions upon the mutual obligations of the mineral

lease, James A. George, 24 La. Law Review, at page 575.

> "The typical spacing regulation applies only to a specific producing stratum. Therefore, this type of regulation does not seem to affect the implied covenant of further exploration as to sands not affected by the spacing order. If a given area has two or more producing sands, the well density at the surface may be much greater than that ordered for the wells going to only one particular stratum. Accordingly, it would appear that the lessor could prevail in a case in which he contended that the lessee had breached his covenant of further exploration, and that *the lessee would have no defense in the spacing order where his failure was to explore sands not affected by the order.*" I D at pages 586, 587.

The *Delatte* decision also recognized the validity of the "Pugh" Clause in a lease in order to require the drilling of additional wells after the unit well:

> "Plaintiffs further contend that the *unitization* of a portion of the leased premises *did not prohibit* or prevent the defendant from *performing* the drilling obligations *on that portion of the property not included within the unit.* We find the lease silent in that respect. *We therefore conclude that had the parties* to this lease *intended that drilling operations on the area not embraced within the unit would be conducted* by defendant Woods *as an obligation* flowing from said contract *that intention* would have been manifested and emphasized by express provisions contained in the lease."

Delatte v. Woods, 94 So. 2d 281, at pages 288, 289.

In other words, *Delatte* would have been decided differently if the lease contained a "Pugh" Clause or an express development clause. The Miller Lease has both.

It is well recognized by Louisiana law, as set forth in the Louisiana Law Review Article cited above, that the operator of the lease is obliged under the doctrine of implied development to drill to the deeper strata or strata outside the unit, and in this case, there are five sands which underlie the Miller Lease (see plat I, appendix p. 35) only two of which were unitized on May 5, 1958, and which were unitized as to the north one-half only of these sand strata as they underlie the Miller Lease premises.

The distinctions noted above with regard to the *Delatte* case, *supra*, are also attributive to the *Sohio* case, *supra*. This was later recognized by the Louisiana Supreme Court in the case of *Odom v. Union Producing Company*, 243 La. 48, 141 So.2d 649 (La. S. Ct. 1962).

The court in the *Odom* case, *supra*, had before it the following lease provision:

> "Lessee is hereby granted the power and right, at its option and without Lessors' joinder or further consent, at any time while this lease is in force, either before or after production, to combine and pool the lease, mineral and royalty rights in all the lands covered by this lease or any portion thereof with any other land, lands,

lease, leases, mineral and royalty rights or any of them, adjacent, adjoining or located within the immediate vicinity of this lease, whether owned by Lessee or some other person, firm or corporation so as to create by such combination and pooling one or more drilling or production units * * *. As between the parties hereto the entire acreage so pooled into a drilling or production unit or units shall be treated, for all purposes except the payment of royalties and the lieu royalties on the production from the pooled unit or units, as if it were included in this lease. In lieu of the royalties and the lieu royalties elsewhere herein specified, Lessors shall receive, on the production from each unit created hereunder, only such proportion of the royalties stipulated herein as the amount of Lessors' acreage (mineral or royalty rights) placed in the unit bears to the total acreage included in the particular unit involved * * *. If such operations be conducted on or production be secured from land in any pooled unit other than land covered by this lease, it shall have the same effect as to maintaining Lessors' and Lessee's rights in force hereunder as if such operations were on or such production from the land covered hereby, except that this effect shall be limited to the land covered hereby which is included in such pool unit."

Odom v. Union Producing Co., 141 So. 2d 649, at page 662.

It is to be noted from the above provision that this lease provided for the pooling *either before or after*

production, whereas under the Miller Lease, as previously mentioned, it was specifically provided that the drilling obligation had to occur before pooling of the leased premises. (R. 61.) This distinction was recognized by the Court in the *Odom* case, *supra,* wherein the Court made the following pertinent observation:

> *"Unlike the lease in that case, the present lease authorizes pooling after production and does not require the production to be from a well completed to production on the unit. Because of the variant lease provisions, we find the case inapplicable."*
>
> *Odom v. Union Producing Co., 141 So. 2d 649,* at page 664. (Emphasis added.)

The rule enunciated by the Court in the *Odom* case, *supra,* was observed by the District Court in the instant case, wherein the court, referring to the "unless clause", commented:

> "The language is definite. This is not an Odom ('Odom v. Union Producing Company' 141 So. 2d 649) lease. Unlike the lease here, the Odom lease authorized pooling after production and did not require as here that the drilling (spudding in) be after notice, after hearing, and after the issuance of the unitization order. There, the lessee drilled the well, timely delay rentals were paid throughout the primary term, timely 'lieu royalty' payments were tendered thereafter, the lease authorized voluntary pooling after production. On this phase of the instant case it is similar to Wilcox ('Wilcox v. Shell Oil Company' 226 La. 417, 76 So. 2d 416), where the lease required

that the pooling take place prior to drilling. Paragraph 3 of the instant lease expressly provides that the drilling (spudding in) must be after notice, after the hearing, and after the order of the Conservation Department. Here, the Durke Well was spudded in by a third party on land then not unitized with any portion of this lease. It was spudded in on March 4, 1957 and the Conservation Order was not issued until March 13, 1957. Under these facts and the unequivocal terms of the lease, the rights granted could be kept alive only by paying the specified delay rentals."

Miller v. Kellerman, 228 *F. Supp.* 446, at pages 460, 461.

The *Odom* case, *supra*, therefore recognized the limitation on the drilling obligation as embodied in Paragraph 5 of the Miller Lease. (R. 61.) This limitation stated simply requires pooling before drilling. This limitation on the drilling option has been judicially recognized by the Louisiana Supreme Court in *Wilcox v. Shell Oil Company*, 76 So. 2d 416 (La. S. Ct. 1954).

There is yet another reason why the conservation order, which pooled the north half of the Miller Lease, did not supersede the provisions of the "unless clause" (R. 61) of the Miller Lease. In this regard, we respectfully direct the court's attention to Paragraph 6 of the Miller Lease, (R. 64) which provides as follows:

"6. If in the exercise of the rights herein granted minerals be developed or produced in paying quantities in or on the premises or on acreage

pooled therewith, the said Lessee binds itself to thereafter proceed with the drilling (spudding in) of another well on the premises or on acreage pooled therewith within six months, from the date said last producer is brought in, and to so continue within the six months periods until full development of the property has been accomplished."

Paragraphs 3 and 6 of the Miller Lease must be read together inasmuch as both refer to the drilling obligation of the Miller Lease. The Durke Well was completed as a gas well on April 12, 1957. Accordingly, the completion of the Durke Well prior to the first delay rental date of May 5, 1957, imposed upon Kellerman the obligation to drill a well within six months from the completion of the Durke Well.

The District Court recognized this drilling obligation on the part of *Kellerman*, stating as follows:

"Defendants interpret Paragraph 6 as triggering a drilling obligation only when they drill a well on the leased premises or on land pooled with it. By brief they say: 'Surely it could not be construed to impose an obligation on the defendants because other lessees have drilled wells on other leases and a portion of the Miller Lease is included in units around such other wells.'

"We take a different view of the unequivocal language of Paragraph 6:

"'If in the exercise of the rights herein granted minerals be developed or produced in paying quantities in or on the premises or

> *on acreage pooled therewith,* the said lessee binds itself to thereafter proceed with the drilling of another well on the premises or on acreage pooled therewith within six (6) months * * * .'" (Emphasis added.)
>
> *Miller v. Kellerman, 228 F. Supp. 446,* at page 463.

The obligation to drill an additional well under the provisions of Paragraph 6 (R. 64), were in no way superseded by the conservation unit formed by the Conservation Commissioner. This order simply held the development of the unitized area to one unit well. Thus, although the Durke well was drilled on the unit created, which included the north half of the Miller Lease as to the C-6 and SD-1 sand strata only, a well or wells could have been drilled to the strata located outside the contents of these units, namely the SD-2, SD-3 and SD-4 Sands. This failure to drill additional wells after the completion of the Durke Well, terminated the lease under the automatic termination clause in Paragraph 20 of the Miller Lease (R. 77).

The decisions of the Louisiana Supreme Court in the *Odom* and *Wilcox* cases, *supra,* when considered in light of the provisions of the Miller Lease, make it abundantly clear that Kellerman failed to exercise his option to drill during the third year of the primary term of the Miller Lease. Kellerman, therefore, had either to pay the specified delay rental or terminate the lease. This he failed to do, resulting in the lease termination under its own terms as of May 5, 1958. *Johnson v. Smallenberger,* 237 La. 11, 110 So. 2d 119, (La. Sup. Ct. 1959).

II. THE UNITIZATION ORDER OF THE CONSERVATION COMMISSIONER AND THE PAYMENT BY KELLERMAN OF THE IMPROPER DELAY RENTAL DID NOT MAINTAIN THE NORTH HALF OF THE MILLER LEASE.

Petitioners, by way of alternative argument, propose that the erroneous payment of $3,900.00 on April 23, 1958 (R. 43) maintained the south half of the Miller Lease in effect since the northern half of the Miller Lease was contained in the unit established by the Conservation Commissioner. Presumably, on the basis of this argument, petitioners are reading into the Miller Lease a reduced delay rental provision for acreage outside a conservation unit. The fact is, the Miller Lease contains no proportionate acreage reduction clause, and in the absence of such a proportionate reduction clause, the entire delay rental of $7,800.00 was due on or before May 5, 1958, and was not paid.

It is further to be noted that the lessee in the instant case is given the right to retain and maintain acreage beyond the termination period of the lease only by the *actual production* of minerals. In this regard, Paragraph 9 of the Miller Lease (R. 72) provides as follows:

> "* * * That lessee's rights in and to that portion of the premises so retained shall enure only so long as lessee shall continue to produce sulphur, potash, oil, and other hydrocarbon minerals from said well or wells on said tract or tracts so retained or on acreage pooled therewith in paying quantities * * *" (R. 72, lines 16 through 21).

In addition to the clear and unambiguous language of the Miller Lease, the Louisiana Supreme Court, in the case of *Landry v. Flaitz,* 245 La. 223, 157 So. 2d 892 (La. S. Ct. 1963), squarely held that a shut-in well cannot retain acreage in the absence of *actual production.* The rationale of this rule is succinctly set forth by the court in the *Landry* case, *supra,* as follows:

> "Discovery of a well *capable* of producing minerals in paying quantities does not satisfy the requirement that oil, gas or some other mineral be produced under the habendum clause in order to continue the lease in full force and effect beyond the primary term. In the case of an oil well there must be actual production in progress at the time of the expiration of the primary term in order that the life of the lease may be continued beyond the primary term. This same rule applies whether the well is located on the leased premises, or the leased premises are included in a unit formed under existing laws and regulations. In Davis v. Laster, 242 La. 735, 138 So. 2d 558 (1962) we observed in connection with a similar lease that:
>
> " 'The plain language of the lease contract provides for its termination at the end of the primary term, unless it can be considered that oil, gas or other minerals are being produced from the leased premises or lands pooled therewith. The production required to maintain the lease must be either actual or constructive.'
>
> "Unitization orders issued by the Commission will not alter a requirement that there be pro-

duction to maintain the lease beyond the primary term to mean that the mere discovery of oil is sufficient to maintain the lease beyond the primary term.

"This proposition is supported by Cox v. Acme Land & Investment Co., 192 La. 688, 188 So. 742 (1939), wherein this court observed:

> " 'The discovery of oil or gas never extends the primary term of a mineral lease, which is that period stipulated by the parties during which the lease may be kept alive by means other than the actual production of oil or gas.'

"Not only must there be actual production of oil to maintain the lease beyond the primary term under the habendum clause, but that production should be understood to mean production in paying quantities in the absence of a stipulation that it should be production in paying quantities. Caldwell v. Alton Oil Co., 161 La. 139, 108 So. 314 (1926); Green v. Standard Oil Company of Louisiana, 146 La. 935, 84 So. 211 (1920).

"We are aware that in some jurisdictions 'discovery' rather than 'production' is sufficient to hold the lease beyond the primary term where the well was capable of production but had not in fact been produced. Williams, Oil and Gas Law, Sec. 604.1 (1962 ed.). However, such a result cannot obtain in this state in view of the language of the contested lease. LSA-Civil Code, art. 1901."

Landry v. Flaitz, 157 So. 2d 892, at page 895.

In summary, the Miller Lease contained a specified delay rental, with no proportionate acreage reduction clause. The failure of Kellerman to comply with this delay rental provision resulted in the automatic termination of the Miller Lease as to all acreage, both within and outside of the conservation unit. Furthermore, inasmuch as there was no actual production on the shut-in unit well, which well was located on a tract adjacent to the Miller Lease, the lease automatically terminated as to that portion of the lease contained in the conservation unit as well as the land outside the conservation unit.

III. THE FAILURE TO PAY THE PROPER DELAY RENTALS WAS NOT A MUTUAL MISTAKE AND MILLER HAD NOT WAIVED HIS RIGHT TO HAVE THE LEASE CANCELLED BY FAILING TO DEMAND THAT THE PROPER DELAY RENTAL BE PAID.

Petitioners' contention that the failure to pay the proper delay rental was the result of a pardonable error and that they should now be permitted to pay the proper delay rental is based solely on the case of *Jones v. Southern Natural Gas Co.*, 213 La. 1051, 30 So. 2d 34 (La. S. Ct. 1948).

The District Court after considering numerous Louisiana decisions on this question, commented on the applicability of the *Jones* case, *supra,* as follows:

> "We pass to defendants' next defense: that the error was an innocent one—a mutual one—and

that they should now (some five years later) be permitted to rectify it. In support of this defense, counsel cites and relies heavily on Jones v. Southern Natural Gas Co., 213 La. 1051, 36 So. 2d 34 (1948) and Davis v. Laster, 242 La. 735, 138 So.2d 558 (1962).

"These decisions have enunciated the principle that the right to dissolve a lease is subject to judicial control according to the circumstances. This idea is appealing, for it honestly concedes a breach but permits judicial control where the result would be onerous and the mistake is pardonable. Later decisions illustrate the reluctance of the Louisiana Supreme Court to apply this doctrine. (Atlantic Refining Company v. Shell Oil Company, 217 La. 576, 46 So. 2d 907 (1950); Johnson v. Smallenberger, 237 La. 11, 110 So. 2d 119 (1959); Rushing v. Griffin, 240 La. 31, 121 So. 2d 229 (1960); Broussard v. Phillips Petroleum Company, 160 F. Supp. 905, D.C. La. 1958, affirmed 265 F. 2d 221. Surely, great caution must be exercised in utilizing judicial power to revitalize an agreement that has been terminated by its own terms. In my judgment, the circumstances warranting the application of such power must appear of record with the greatest and most convincing clarity.

"Surely, under the facts of this case, Jones and Laster are not controlling. Laster has no relevance and Jones is easily distinguishable. In Jones (supra) the original lease covered 518 acres, more or less, at an annual rental charge of $1.00 per acre. The lease provided that in the

event of an assignment in whole or in part, the rental payments were to be apportioned ratably according to the surface area of each. The defendant became the assignee of a portion of the lease and on the due date for rental payment in 1944 deposited $300 to the credit of plaintiff, which amount was arrived at by defendant's computation that the area covered by its assignment comprised 300 acres (this was pegged on the reasonable assumption that a section contained the regulation 640 acres). Again, on the due date in 1945, the amount of $300 was deposited but shortly thereafter plaintiff sought a decree of forfeiture. There was and still is a grave question as to how much acreage was included in the assignment. Three different surveyors surveyed the land and each came up with a different result. One concluded that there were exactly 300 acres covered; one came up with the conclusion that there were 320 acres involved. Louisiana's Supreme Court, sharply divided, held that under those circumstances the mistake was normal, justified and innocent, and that equity should intervene. But, the Court, in speaking of the likelihood of error in ascertaining the amount of acreage involved, was quick to point out:

> " '* * *this case is different from one where the lessor has stated in the lease, in dollars and cents, the exact amount of the annual rental which must be paid by the lessee, and where there has been no assignment of a segregated part of the land covered by the original lease.'

"The distinction pointed out by the Supreme Court in Jones and quoted above constitutes precisely the facts of instant case where the amount of rental was pointed out in dollars and cents to be $7,800, and the lease was still intact in its entirety."

Miller v. Kellerman, 228 F. Supp. 446, at pages 457, 458.

In the instant case, there can be no question, under the provision of Paragraph 3 of the Miller Lease (R. 61) what the correct delay rental was. This being so, the failure to pay the proper delay rental terminated the lease by its own terms. *Johnson v. Smallenberger,* 237 La. 11, 110 So. 2d 119 (La. S. Ct. 1959). This conclusion is further evidenced by the language of the Louisiana Supreme Court in the case of *Bollinger v. Texas Company,* 232 La. 637, 95 So. 2d 132 (La. S. Ct. 1957), wherein the court observed:

"A Lessee must comply with his lease terms. Whether production payments are larger or smaller than 'shut-in' payments, they must be paid on accurate computations and as such. Plaintiff had the right to be paid in accordance with the method provided by the terms of the lease—not at the whim or caprice of the defendant. Where the whim of defendant could or might affect a Lessor's rights under a lease, courts should always (as we are doing here) intervene to protect those rights."

Bollinger v. Texas Company, 95 So. 2d 132, at page 137.

Also apropos is the following excerpt from *Johnson v. Smallenberger, supra:*

> "Counsel's error arises from the fact that they rely on statements taken from the above cases and attempt to apply them to the instant case, where the factual situation is different. The Jones case is clearly inapplicable; it involved an erroneous calculation by one of the assignees of a mineral lease as to the area covered by his designated portion, this miscalculation having resulted in payment (and acceptance) of a lesser amount than was actually owed as delay rental; but under the circumstances this was held (by the majority view) to be an excusable and mutual mistake, and not sufficient to 'demand a forfeiture' (of the lease so far as it affected the defendant-assignee's portion) for nonpayment of the rental within the time stipulated.' (213 La. 1051, 36 So. 2d 38.) The Risinger case, relied on particularly for the plea of estoppel and said to be so similar factually that portions are paraphrased in defendant's brief, is equally inapplicable. A perusal of that case shows its holding to be that an erroneous method of payment, by deposit in the wrong bank, of a stipulated yearly royalty of $200 for a gas well (*there being no provision that the lease would automatically terminate for its non-payment,* delay or error in payment), was 'merely a failure to perform with literal exactness a personal obligation *and not a failure to perform a condition precedent to the continuance of the lease.*' 198 La. at page 116, 3 So. 2d at page 294.

"Under the facts of the instant case, the lease was at an end immediately upon non-payment of the rental due on May 6, 1956. According to the plain provisions of the type of contract known as the 'unless' lease, as universally interpreted, the lessee is under no duty either to drill or to pay delay rentals; if he either drills or pays, the lease remains in effect, but if he does neither, it ipso facto terminates at the time of default. See 2 Summers, Oil & Gas, Perm. Ed., Sec. 452, pp. 494-499. 'The clause * * * is used, not for the purpose of fixing a duty upon the lessee to drill or pay, but to state a limitation upon which the lease terminates if these acts are not performed.' Ibid., pp. 494-495."

Johnson v. Smallenberger, 110 So. 2d 119, at pages 121, 122.

Petitioners' argument of waiver or estoppel because of respondent's silence as to the correct delay rental is equally without merit, and has been refuted by the Louisiana Supreme Court on numerous occasions.

In this regard it has been repeatedly held that where the contractual termination is plainly set forth, no estoppel or waiver may be invoked to set aside this automatic termination. Accordingly, considerations of equity are not admissable for the determination of contractual rights clearly expressed. *Baker v. Potter,* 223 La. 274, 655 So. 2d 598 (La. S. Ct. 1953).

That this rule also applies to the automatic termination clause of a mineral lease, is evidence by the

court in *Johnson v. Smallenberger, supra,* wherein the court enunciated the following rule:

> "It is well settled that to give rise to estoppel by silence or inaction, there must be not only an opportunity to speak but also an obligation or duty to do so; 'There must be some element of Turpitude or negligence connected with the silence or inaction by which the other party is misled to his injury' (19 Am. Jur. 663-664, Verbo Estoppel, Sec. 55); and the plaintiff was neither under a duty to notify the defendant that the latter had failed to pay the amount of rental nor to give him an opportunity to repair the lapse. Defendant's efforts to place such a duty on plaintiff can avail him nothing."
>
> *Johnson v. Smallenberger, 110 So. 2d 119,* at page 122.

CONCLUSION.

For the reasons above discussed, and on the basis of the authorities cited, it is respectfully submitted that the District Court and Court of Appeals correctly held that the Miller Lease terminated under its own terms and should be cancelled according to the judgment rendered by the District Court and subsequently affirmed by the Court of Appeals. Respondent therefore submits that this Honorable Court should deny petitioners' application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in R. E. Kellerman et al vs. Preston J. Miller.

Respectfully submitted,

DOMENGEAUX & WRIGHT,

By .....
JAMES DOMENGEAUX,

By .....
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Attorneys for Respondent.

CERTIFICATE.

I, the undersigned, do hereby certify that copies of the within briefs were duly served on petitioners' attorney, Mr. J. Mort Walker, by placing a copy thereof in the United States Mail, postage prepaid, under cover addressed to him at his address of record in these proceedings, this 3rd day of May, 1966.

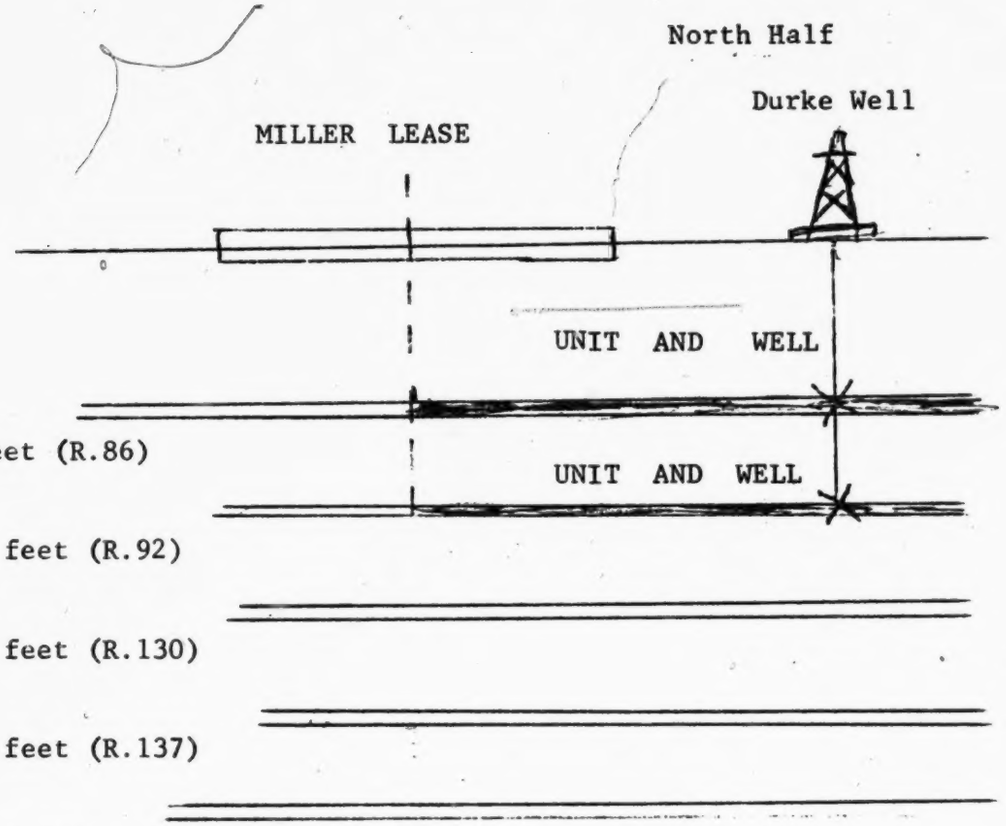
JAMES DOMENGEAUX.

MILLER LEASE:

DURKE WELL:
North Half Only

Shut-in: No Production

May 5, 1958:



Cristellaria - 6 Sand Stratum:
Cons Order 367: depth of 11,552 to 11,682 feet (R.86)

Siphonina-davisi - 1 Sand Stratum:
Cons.Order 367 A; depth of 11,804 to 11,833 feet (R.92)

Siphonina-davisi - 2 Sand Stratum:
Cons.Order 367 C; depth of 11,975 to 12,007 feet (R.130)

Siphonina-davisi - 3 Sand Stratum:
Cons.Order 367 D; depth of 12,163 to 12,201 feet (R.137)

Siphonina-davisi - 4 (Nunez) Sand Stratum:
Cons.Order 367 B; approximate depth of 12,304 feet (R.110); (Stipulation XIX; R. 47)

PLAT I

WALTER DURKE WELL:

SPUDDED MARCH 4, 1957

COMPLETED APRIL 12, 1957:
Well # 1-D C-6 Sand
Well # 1 SD-1 Sand (NO UNIT)

NO PRODUCTION : SHUT IN (R.41)

CONS. ORDER #867 3-18-57

POOLED C-6 ONLY : NO UNIT SD-1 SAND

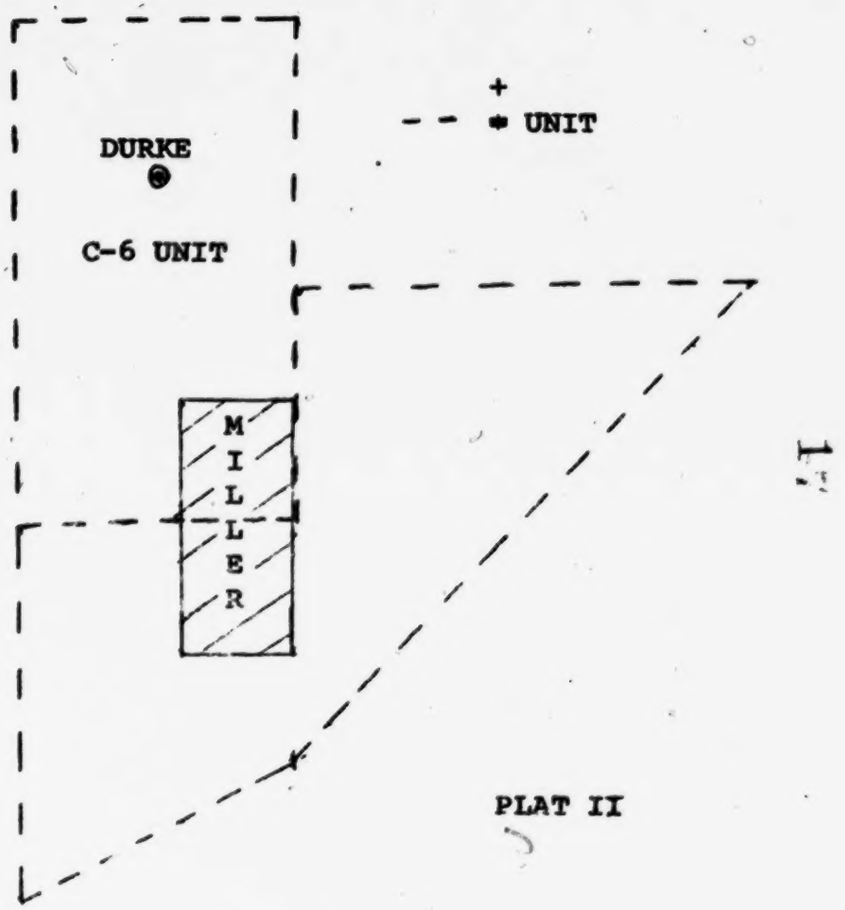
DELAY RENTAL OF $ 3900 DUE TO

MAINTAIN LEASE FOR ONE YEAR

WITHOUT ADDITIONAL DRILLING

PAID BEFORE DELAY RENTAL DATE

OF MAY 5, 1957 (R. 41,90).



PLAT II

By the date of the SECOND delay rental due date, May 5, 1958, the situation was changed as shown below only in that the north half was then unitized as to the SD-1 sand:

DURKE WELL: STILL SHUT IN

CONS. ORDER # 367-A 11-6-57

POOLED SD-1 SAND: SAME UNITS

AS C-6 SAND (R. 42, Plat R.90)

MILLER LEASE:

DELAY RENTAL DUE MAY 5, 1958 $ 7800

RENTAL PAID 4-23-58 (R. 43) $ 3900

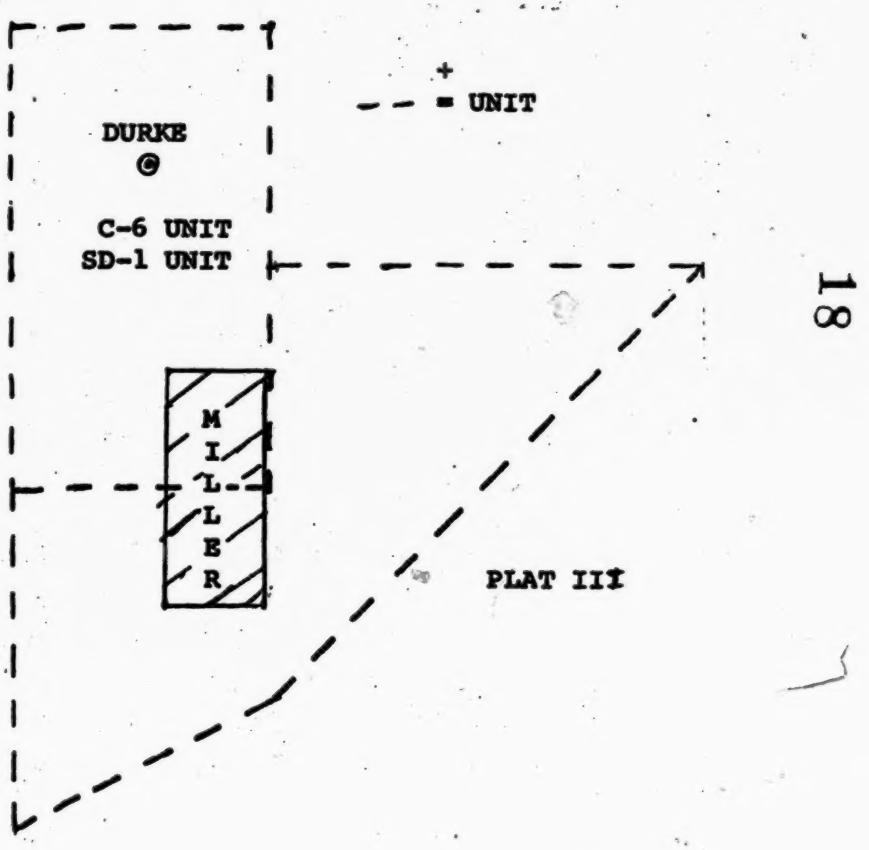
LEASE TERMINATED FOR NON-PAYMENT

OF FULL DELAY RENTAL MAY 5, 1958.

NO DRILLING IN PROGRESS, NO WELL

IN PRODUCTION, NO DEVELOPMENT OF

SOUTH HALF OF MILLER TRACT.



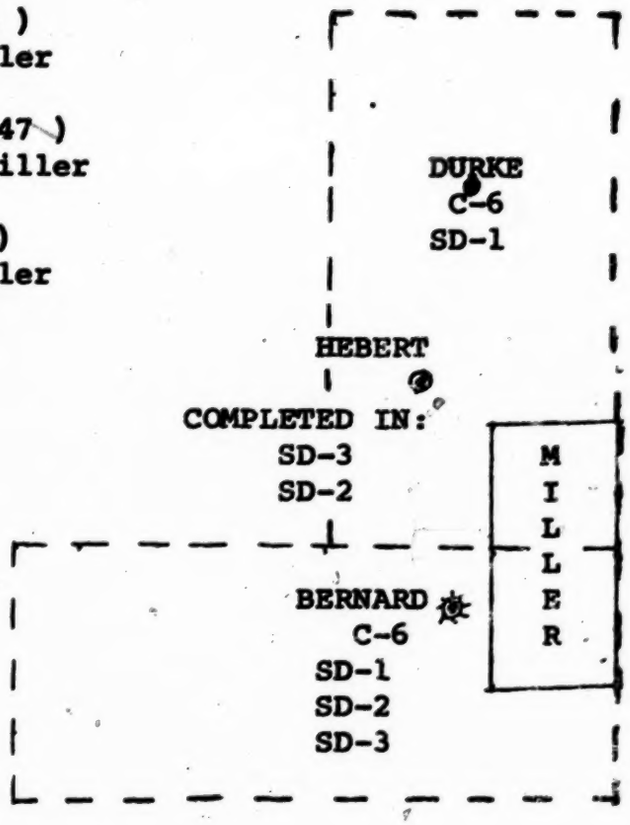
BERNARD WELL (R. 45)
400 feet from Miller

NUNEZ WELLS (R. 46,47)
1,220 feet from Miller

HEBERT WELL (R. 45)
800 feet from Miller

SEE PLAT R. 108

NO UNIT AS TO
SD-2, SD-3 OR
SD-4 SANDS.



\+
— — = UNITS
(C-6 & SD-1 ONLY

NUNEZ (R. 46, 47)
#1-A
#1

C-6	C-6
SD-1	SD-1
SD-2	SD-2
SD-3	SD-3
*	SD-4

PLAT IV